

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRANK NOONAN, et al.	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
	:	
KATHLEEN KANE, et al.	:	NO. 15-6082

MEMORANDUM

Bartle, J.

December 2, 2016

Before the court is the motion of plaintiffs "pursuant to Rule 60(b) to vacate order granting defendant Kane's motion to dismiss plaintiffs' amended complaint and seeking leave to file a second amended complaint."

Plaintiffs are Frank Noonan, Randy Feathers, Richard A. Sheetz, Jr., E. Marc Costanzo, and Frank Fina. Noonan is the retired Commissioner of the Pennsylvania State Police. Feathers is a retired Regional Director of the Bureau of Narcotics and Investigation and Control of the Office of the Attorney General of Pennsylvania ("OAG"). Sheetz served as a former Executive Deputy Attorney General Directing the Criminal Law Division of the OAG. Costanzo is a former Deputy Attorney General for the OAG. Finally, Fina is a former Chief Deputy Attorney General for the OAG.

Plaintiffs' first amended complaint contained claims under 42 U.S.C. § 1983 and supplemental state law claims

involving six defendants: former Pennsylvania Attorney General Kathleen Kane; Michael Miletto, an investigator for the Office of the Attorney General; the Philadelphia Daily News; one of its reporters, Christopher Brennan; and Philadelphia Media Network, LLC and Philadelphia Media Network (Digital) LLC, which together own the Philadelphia Daily News.

Plaintiffs alleged that Kane, in violation of § 1983, retaliated against them for engaging in speech protected by the First Amendment. Costanzo and Fina averred that Kane, Miletto, and Brennan engaged in a conspiracy to retaliate against them for the same protected speech. Costanzo and Fina also raised defamation and false light claims under Pennsylvania law against Brennan, Philadelphia Media Network, LLC, and Philadelphia Media Network (Digital) LLC.

The defendants filed motions to dismiss the respective counts against them pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. On July 19, 2016, we granted defendants' motions to dismiss Counts I through VI for failure to state a claim. We dismissed without prejudice pursuant to 28 U.S.C. § 1367(c)(3) the supplemental state law claims presented in Counts VII and VIII. Plaintiffs filed a notice of appeal on August 9, 2016.

While the appeal is pending, plaintiffs filed on October 26, 2016 a motion with this court pursuant to Rule 60(b) of the Federal Rules of Civil Procedure to vacate the court's order granting the defendants' motions to dismiss on the ground that new evidence has come to their attention. They seek leave to file a second amended complaint.

Under Venen v. Sweet, while an appeal is pending the district court has the ability to entertain and deny a Rule 60(b) motion. 758 F.2d 117, 123 (3d Cir. 1985). However if a district court is inclined to grant the Rule 60(b) motion, it must certify this intention to the Court of Appeals. Id. It is only if the Court of Appeals remands the case does the district court have the power to grant the motion. Id.

Plaintiffs urge us to advise the Court of Appeals of our intention to grant relief under Rule 60(b) and to allow them to file a second amended complaint. They seek to incorporate into their proposed pleading recently released testimony from Kane's recent state court criminal trial, which concluded with a guilty verdict on August 15, 2016. See Commonwealth v. Kane, No. CR-6239, CR-8423 (Ct. Comm. Pl. Montgomery Cnty. 2016). The testimony, which they attach to their motion, is that of Joshua Morrow, who testified against Kane at the trial and during a grand jury investigation. This testimony was not available to plaintiffs at the time the first amended complaint was filed.

While plaintiffs seek to file a second amended complaint in light of this recent testimony, they have not attached a proposed second amended complaint to the instant motion. They apparently expect the court to cull through more than 200 pages of testimony and speculate as to what plaintiffs would allege and against whom in the new version of their pleading. This is not the proper role of this court.¹

Accordingly, we will deny plaintiffs' motion "pursuant to Rule 60(b) to vacate order granting defendant Kane's motion to dismiss plaintiffs' amended complaint and seeking leave to file a second amended complaint."

1. Plaintiffs' entire request for relief is unspecific. It is unclear whether plaintiffs seek the reversal of the portion of the order that granted Kane's motion to dismiss, or whether they seek the reversal of the court's entire order that granted defendants' motions to dismiss. (See Doc. # 43). While the caption of plaintiffs' motion only references Kane, the body of plaintiffs' brief suggests the second amended complaint would contain amended claims against all defendants. (See Doc. # 47). As noted above, plaintiffs have neither provided a proposed second amended complaint nor identified which counts or defendants would be implicated.

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ORDER

AND NOW, this 2nd day of December, 2016, for the reasons set forth in the accompanying memorandum, it is hereby ORDERED that the motion of plaintiffs Frank Noonan, Randy Feathers, Richard A. Sheetz, Jr., E. Marc Constanzo, and Frank Fina "pursuant to Rule 60(b) to vacate order granting defendant Kane's motion to dismiss plaintiffs' amended complaint and seeking leave to file a second amended complaint" (Doc. # 47) is DENIED.

BY THE COURT:

/s/ Harvey Bartle III

J.